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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, [redacted] TERM
1969

NO. [redacted] 89

LESTER NEHRING,

Petitioner,

v.

EMPRESA LINEAS MARITIMAS ARGENTINAS,

Respondent,

v.

STRACHAN SHIPPING COMPANY,

Third Party
Respondent

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

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INDEX

Page

Reference to Opinions Below.....2

Grounds on Which Jurisdiction is Invoked.....2

Questions Presented.....2

Statutes and Rules Involved.....3

Statement of Case.....4

Reasons for Granting Writ First Question.....7

Argument - First Question.....7

Reasons for Granting Writ Second Question.....10

Argument - Second Question.....10

Certificate of Service.....12

Appendix A
Copy of Opinion - Nehring v. Empresa Lineas Maritimas Argentinas.....1A

Appendix B:
Judgment - October 7, 1968.....1B

Appendix C:
Order Overruling Petition for Rehearing.....1C

Appendix D:
Order Extending Time to File Petition for Writ of Certiorari.1D

Page

Appendix E:
Order Extending Time to File Petition for Writ of Certiorari.....1E

Appendix F:
Copy of Opinion - Strachan Shipping Co. v. Nehring.....1F

Appendix G:
Challenges
28 U.S.C. 1870.....1G

Appendix H:
Consolidation; Separate Trials
Rule 42(b) FRCP.....1H

Appendix I:
Permissive Joinder of Parties
Rule 20 FRCP.....1I

Appendix J:
Third Party Practice
Rule 14(a) FRCP.....1J

Appendix K:
Special Verdicts and Interrogatories
Rule 49(a) FRCP.....1K

Appendix L:
Proceedings - February 22,1967..1L

Appendix M:
Testimony - Dr. Hudgins.....1M

Appendix N:
Verdicts of the Jury in Answer to Interrogatories Propounded

Page

to it by the Court Under the Provisions of Rule 49(a) of the Federal Rules of Civil Procedure.....1N

Appendix O: Additional Requested Information.....10

Appendix P.....1P

LIST OF AUTHORITIES

Baltimore and South Carolina v. Redman, 55 S. Ct. 890, 891, 295 U.S. 654,657.....10

Colorado Santa Fe R. Co. v. Shane, 157 U.S. 348, 15 S. Ct. 641 39L. Ed. 727.....8

Marshall v. Isthmian Lines, Inc. 334 F_2 136.....11

In Re: Murchison 349 U.S. 133, 136; 75 S. Ct. 623,625.....8

Pellegrim v. Chicago and Great Western Railway Company, 319 F_2 447.....11

Rogers v. Devries, 236 F.S. 110.....8

Swain v. State of Alabama 85 S. Ct. 824, 835; 380 U.S. 203,219.....8

Page

Weyerhauser S.S. Co. v. Nacirema Operating Co., 78 S. Ct. 438, 441; 355 U.S. 563, 568.....7

STATUTES AND RULES

28 U.S.C. 1254(1).....2

28 U.S.C. 2101(c).....2

Rule 14(a) FRCP.....3,9

Rule 49(a) FRCP.....3,5,10,11

28 U.S.C. 1870.....3, 9

Rule 42(b) FRCP.....3, 9

Rule 49(a) FRCP.....3

28 U.S.C. 1332.....4

33 U.S.C. 901, et seq.....6

Rule 20 FRCP.....9

RELATED CAUSE

Strachan Shipping Company, et al v. Shea, et al 406 F_2 521.....6

Strachan Shipping Company, et al v. Shea, et al Petition for Certiorari #1254 (now pending).....6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1968, TERM

NO. ____

LESTER NEHRING,

Petitioner,

v.

EMPRESA LINEAS MARITIMAS ARGENTINAS,

Respondent,

v.

STRACHAN SHIPPING COMPANY,

Third Party Respondent

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

LESTER NEHRING, Petitioner, petitions that writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause on the 7th

day of October, 1968, and its Order refusing Petition for Rehearing dated December 5, 1968.

REFERENCE TO REPORTS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported at 401 F_2 767 in Appendix A. The order overruling Petition for Rehearing, not published, appears in Appendix B. There was no written opinion by the District Court.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The date of the judgment of the Circuit Court of Appeals sought to be reviewed is October 7, 1968 - entered the same date. Petition for Rehearing was denied on December 5, 1968. This Court on February 25, 1969, extended the time for filing petition for writ of certiorari to and including April 4, 1969; thereafter on April 7, 1969, the time for filing petition was further extended to and including April 24, 1969; no terms were imposed on the orders.

The statutory provisions believed to confer jurisdiction on this Court to review the judgment or decree in question by writ of certiorari are 28 U.S.C. 1254(1), and is filed within the time allotted by 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

1. Did Court of Appeals err in holding

that it did not constitute prejudicial error for trial court to deny alternative motions by plaintiff longshoreman suing vessel owner on personal injury claim arising from asserted unseaworthiness of vessel and/or negligence of vessel owner where the vessel owner in the same suit has been allowed to implead the plaintiffs stevedore employer under Rule 14(a) FRCP for indemnity, to either allow plaintiff the same total number of peremptory challenges to the jury panel allowed respondents or sever the indemnity action from the trial of his action against the vessel owner.

2. Did the Circuit Court of Appeals err in holding that the trial court did not commit prejudicial error in refusing to give plaintiff's requested instructions, or to charge the jury on what it would consider an injury to be, where the evidence was susceptible of different interpretations and the jury was required to answer as the first interrogatory, submitted under Rule 49(a) FRCP, "Did the plaintiff, Lester Nehring, sustain an injury while working aboard the Rio Bermejo on or about January 9, 1964?"

STATUTES AND RULES INVOLVED

1. 28 U.S.C. 1870 - Appendix G.
2. FRCP 20 - Appendix I.
3. FRCP 42(b) - Appendix H.
4. FRCP 14(a) - Appendix J.
5. FRCP 49(a) - Appendix K.

STATEMENT OF CASE

Petitioner Nehring, plaintiff in the trial court, who had previously sustained injury to the lumbar area of his back resulting in spinal surgery, performed by the only physician (an orthopedic specialist) testifying in the case, and who operated on him for the injuries alleged as the basis of this suit, brought suit against Empresa Lineas Maritimas Argentinas by reason of an injury sustained on the 9th day of January 1964. Jurisdiction was based upon diversity of citizenship and the amount of controversy (28 U.S.C. 1332) P1T. Respondent Empresa Lineas Maritimas Argentinas filed third party complaint P17-25T against impleaded respondent Strachan Shipping Company (petitioners employer) alleging that any injuries sustained by petitioner resulted from breach of warranty of workmanlike service aboard such vessel. Prior to the selection of the jury, petitioner moved the Court alternatively to allow the petitioner the same number of peremptory challenges to the jury panel as was allowed respondent and impleaded respondent collectively or alternatively for separate trial to sever the matter of indemnity. See pages 3-5 of the record. The Court refused the motion, Appendix L. The motion was refused and each respondent given three challenges, instructions were given respondents on the trial. Only one physician was called to testify, this being an orthopedic surgeon who had performed surgery to the lumbar area of

petitioners back prior to the injury made the basis of this suit and who also operated on him for the injuries alleged and who testified on cross-examination herein that petitioners back problems had begun in 1960, prior to the injury made the basis of this suit, and he was unable to determine whether the petitioner had at the time of the injury at issue sustained a new fracture of the previous operative site or had a psuedo-arthrosis. See Vol. II P230-233, Appendix M. The case was submitted to the jury on special interrogatories under Rule 49(a) FRCP with the first interrogatory inquiring if petitioner sustained an injury. Vol. I P71 Transcript of Record, Appendix N.

Petitioner requested the Court to instruct the jury as to what it would consider an injury to be. Requested instruction P59R, appears Appendix O. Petitioner essentially requested the Court to charge that any worsening of petitioner's condition as a result of the occurrence made the basis of this suit would be regarded in law as an injury. Petitioner excepted P624-5R Vol. III, Appendix P and the Court refused to charge. P625 supra and Appendix P.

The jury returned a verdict finding a negative answer as to the interrogatory no. 1. Petitioner appealed, assigning as error the refusal to allow petitioner an equal number of peremptory challenges to the jury panel and the Courts refusal to give the requested instructions as to

what the jury would regard an injury to be for the purpose of answering the first interrogatory or to charge on this matter. The Circuit Court of Appeals denied petitioners appeal, holding there was no merit as to his contention that he should be given an equal total number of peremptory challenges to the jury panel as allowed respondents and that the jury needed no instructions under the facts of this case as to what constituted an injury since respondents denied the incident at issue occurred — even though the interrogatory asked not about the occurrence of the incident, but if petitioner sustained an injury, insofar as is material.

Petitioner being an employee of third party respondent Strachan Shipping Company, in the interim, pursued his claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq. The Deputy Commissioner found that the alleged injury occurred, that he was permanently partially disabled and awarded compensation. Respondent Strachan appealed; the District Court affirmed, and upon appeal the Circuit Court of Appeals 406 F_2 521 affirmed, Appendix F.

Strachan Shipping Company, respondent herein and as petitioner in cause no. 1254 on April 11, 1969, filed petition for writ of certiorari requesting this Court to review the action of the Circuit Court of Appeals in upholding the Deputy Commissioner's refusal to apply the doctrine of collateral estoppel to

the issue of whether petitioner sustained an injury on the occasion in question.

REASONS FOR GRANTING WRIT

First Question

This question involves an important question of federal law which is believed to be decided contrary to decisions of this court; involves the right to peremptorily challenge members of the jury panel and thereby select a fair and impartial jury; that the question should be decided by this Court in view of previous abuse of a similar ruling by a court in the Southern District of Texas and the constantly recurring problem as indicated by the courts ruling on the matter and counsel's comments.

ARGUMENT

First Question

This Court in Weyerhauser S.S. Co. v. Nacirema Operating Co. 78 S. Ct. 438, P441; 355 U.S. 563, 568 indicated clearly that the trial of the indemnity action in such a case as this to the same jury, was not to be at the prejudice of the longshoreman, "— all fact issues involved in the third party action should have been submitted to the jury after the verdict in the main case," citing the problems of different duties.

This Court in Swain v. State of Alabama 85S. Ct. 824, P835; 380 U.S. 202, P. 219 points out the importance of the exercise of peremptory challenges and holds, "— The denial or impairment of the right is reversible error without a showing of prejudice.", citing cases including the Civil case of Gulf, Colorado Santa Fe R. Co. v. Shane 157 U.S. 348, 15S. Ct. 641, 39L Ed. 727. The peremptory is a vital part of dispensing justice under our system. "— to perform its high function in the best way justice must satisfy the appearance of justice." See Swain supra page cited —citing in re: Murchison 349 U.S. 133, 136; 75S. Ct. 623, 625; 99 L. Ed. 942.

The allowance of peremptory challenges as was done in this case takes an added significance, when one considers Rogers v. Devries & Co., 236 F. Supp. 110. In Rogers, supra, the trial court gave essentially the same instructions (except collusion) as was given in this case; however, because of peculiar circumstances existing in that case it was possible to offer proof that defendant and third party defendant in such case deviously avoided complying with the Court's ruling, and upon being confronted with proof that actuarially the odds were 40,000 to 1 that there had been a violation of the Court's Order (because of more than one jury and alternate juror in each case being selected at the same time, it was possible to make this proof which does not appear in the opinion but which was reported and could be trans-

cribed and brought forward if denied); proof of this fact, if it occurred, is not susceptible of being made in this case by reason of only one jury being selected. The defendant and third party defendant in such case then admitted to the Court what had taken place. Such instruction by the Court as was given has not been effective prior to this case, see Rogers, supra; such a procedure as was followed here does not leave the appearance of justice — especially in the eyes of the lay litigant for whom the courts exist.

No one can quarrel with the courts saving time by trying both cases together, except if it results in prejudice to a litigant. The petitioner, plaintiff in the trial court, was faced with two adversaries, each intent upon defeating him, who if unsuccessful could then try to blame the other, who were given twice the total peremptory challenges as was given him; the very number of challenges allowed the defense impaired his right to select a fair jury and was thereby a violation of his rights, see Swain supra.

The trial court could have avoided this prejudice by allowing a separate trial of the indemnity action under Rule 20 FRCP; granting severance or separate trial under Rule 14(a) FRCP or by ordering separate trial under Rule 42(b) FRCP or by limiting respondents to a total of three peremptory challenges under 28 U.S.C. 1870, Appendix G, or by allowing each of respondents three

peremptory challenges to be exercised jointly or separately as they desired and allowing petitioner six peremptory challenges.

REASONS FOR GRANTING WRIT

Second Question

The holding of the Court of Appeals is believed to be contrary to this Courts previous decision, and/or has sanctioned the trial courts failure to give necessary instructions to the jury under Rule 49(a) FRCP and is believed to be contrary to the decisions of another Court of Appeals and is contrary to its own decisions as to giving of instructions.

ARGUMENT

Second Question

The decision of the Court of Appeals is believed to be contrary to this Courts decision in Baltimore and South Carolina Line v. Redman 55 S. Ct. 890, 891; 295 U.S. 654, 657. The interrogatory did not inquire whether the incident made the basis of this suit occurred as the Court of Appeals decision seems to hold that the inquiry was, but whether or not petitioner sustained injury. The word injury is described as meaning a number of things in Websters Dictionary; approximately 60 pages of headnotes appear in words and phrases defining injury under different conditions. The doctor who operated could

not tell if there was a new fracture of the previous operative site or not. Without an instruction to the jury defining what they would regard an injury to be under the facts of this case, we have no way of knowing whether they were considering the incident as having occurred or not occurred when answering the crucial interrogatory or whether they considered that the petitioner must have proved a fracture of the preexisting operative site; if it was the latter, since the burden of proof was upon the petitioner the jury would obviously return a negative answer, when the operating surgeon could not answer the question of what had happened.

The Seventh Circuit in Pellegrini v. Chicago and Great Western Railway Company 319 F_2 447 held that where the evidence would support a verdict for either side, that erroneous instructions required a reversal. The Fifth Court of Appeals in Marshall v. Isthmian Lines, Inc. 334 F_2 136, P137-138 reversed for failure to instruct the jury as to plaintiffs theory of case.

Rule 49(a), Appendix K, authorizing special verdicts, requires the submission of necessary instructions which were not given, but requested. The Court of Appeals has equated the word injury in the interrogatory to occurrence of the incident alleged by petitioner and found by the Deputy Commissioner in a different proceeding, to have occurred. The argument of counsel as to its occurrence or non-occurrence does not

obviate the necessity for necessary instructions.

WHEREFORE, premises considered, petitioner prays that this petition be granted and upon review the cause be reversed with instructions to the Courts below in line with this petition.

Respectfully submitted,

(ORIGINAL SIGNED) W. JILES ROBERTS

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Houston, Texas 77002
223-4601

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari has been served upon each of the following: Royston, Rayzor & Cook, Mr. Carl O. Bue, Jr. of counsel, 877 San Jacinto Building, Houston, Texas 77002 attorneys for Empresa Lineas Maritimas Argentinas, respondent; and upon Eikel & Goller, Mr. Theodore Goller of counsel, 205 Oil & Gas Building, Houston, Texas 77002, attorneys for Strachan Shipping Company, third party respondent, by depositing in a United States Post Office or mailbox the same to each of them, United States Mail, postage prepaid, properly addressed to

each of them at their respective Post Office addresses, prior to forwarding this Petition for Writ of Certiorari to the Clerk of the Supreme Court for filing this 24th day of April, 1969.

(ORIGINAL SIGNED) W. JILES ROBERTS

W. JILES ROBERTS

APPENDIX A

(Caption Omitted)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal from the United States District Court for the Southern District of Texas

(October 7, 1968)

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

PER CURIAM: Appellant Nehring allegedly sustained injuries on January 9, 1964, while working as a longshoreman on the S/S RIO BERMEJO, owned and operated by Appellee Empresa Lineas Maritimas Argentinas. At the time of the alleged accident, appellant was an employee of Strachan Shipping Company, an independent contracting stevedoring company. Appellant brought suit against the shipowner for negligence and vessel unseaworthiness. The shipowner subsequently impleaded the stevedore employer on the theory that, if the ship was to be cast in liability which it denied, such resulting liability stemmed from the stevedore's breach of its warranty of workmanlike service owed to the vessel in the performance of its operations.

Prior to the commencement of the jury trial, appellant moved the trial court to equalize the peremptory challenges, i.e. to give the appellant the same total number of peremptory challenges that

appellees were given. If not given equal challenges, appellant alternatively asked that the shipowner's third party action against the stevedore be severed. Appellant's motion was denied; appellant was given three peremptory challenges; and appellees were each allowed three challenges to be exercised without conferring and with no collusion between them. The appellant claims this was an abuse of the discretion given the trial court in 28 U.S.C. 1870 (1964). There is no merit to this contention.

Following the presentation of the evidence and arguments, the court submitted the case to the jury upon special interrogatories. The first interrogatory read: "Did the plaintiff, Lester Nehring, sustain an injury while working aboard the RIO BERMEJO on or about January 9, 1964?" The jury answered "no" and obviously did not have to go further. Appellant's second contention on appeal is that the trial court erred in not defining, as requested, "injury" as an aggravation of a pre-existing condition, for it was this type of injury about which appellant offered proof. The argument is that the jury decided there was "no injury" without understanding what "injury" meant.

This confuses the purpose of interrogatory number one, as a close reading of the record will reflect. The theory of the defense was that there was never any accident or event or occurrence as and when alleged by appellant: the

shipowner's trial counsel said in his opening argument "We deny that this man sustained an accident on this ship." (R. 18). During the trial of the case, it was to prove or disprove the alleged accident that most of the evidence was offered; and this question was reemphasized during closing arguments of counsel, particularly by appellees. (R. 519). Thus, the crucial issue joined and argued in the trial below was whether or not there was an incident as alleged by appellant.

It was to present this issue to the jury that the trial judge submitted interrogatory number one. (R. 448); and to understand and answer it the jury needed no definition of injury. Extent or type of injury was not the inquiry. There being no need to define injury, this court finds that the jury was fairly instructed.

AFFIRMED.

APPENDIX B

(Caption Omitted)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal from the United States District Court for the Southern District of Texas

(October 7, 1968)

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Lester Nehring, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as Mandate:

APPENDIX C

(Caption Omitted)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal from the United States District Court for the Southern District of Texas

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(December 5, 1968)

ON PETITION FOR REHEARING

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

PER CURIAM: It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby

DENIED.

APPENDIX D

(Caption Omitted)

SUPREME COURT OF THE UNITED STATES
No. ____, October Term, 1968

ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above entitled cause be, and the same is hereby, extended to and including April 4, 1969.

/s/ HUGO L. BLACK
Associate Justice of
the Supreme Court of
the United States

Dated this 25th day
of February, 1969.

APPENDIX E

(Caption Omitted)

SUPREME COURT OF THE UNITED STATES
No. ____, October Term, 1968

ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above entitled cause be, and the same is hereby, further extended to and including April 24, 1969.

/s/ HUGO L. BLACK
Associate Justice of
the Supreme Court of
the United States

Dated this 7th day
of April, 1969.

APPENDIX F

(Caption Omitted)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal from the United States District Court for the Southern District of Texas

(January 13, 1969)

Before JONES and COLEMAN, Circuit Judges, and CHOATE, District Judge.

PER CURIAM: In January, 1964, Lester Nehring, an employee of Strachan Shipping Company, was allegedly injured while working on board the S/S RIO BERMEJO. He instituted a third party suit against the owner of the vessel to recover for the injuries he sustained. The owner in turn impleaded Nehring's employer, Strachan Shipping Company, for indemnity. The jury found that Nehring did not sustain an injury while working on board the vessel and denied recovery.

Thereafter, Nehring filed a claim before the Deputy Commissioner, pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., 901, et seq. The Deputy Commissioner held a formal hearing and, determining that Nehring did in fact suffer personal injuries while working on board the S/S RIO BERMEJO, awarded compensation.

Strachan brought action to set aside the award. The District Court granted summary judgment in favor of the Deputy Commissioner and affirmed the award.

The question is: Did the jury finding that Nehring was not injured while on board the vessel collaterally estop the Deputy Commissioner from deciding to the contrary?

The issue is identical to that presented in Young & Co. v. Shea, 5 Cir., 1968, 397 F.2d 185, in which we held that the Deputy Commissioner was not estopped. That precedent is controlling here.

See also Watson v. Gulf Stevedore Corp., 5 Cir., 1968, 400 F.2d 649, and Goins v. Noble Drilling Corp., 5 Cir., 1968, 397 F.2d 392; petition for rehearing in Young and in Watson denied December 9, 1968, ——F.2d ——.

We again point out that the proceeding before the Deputy Commissioner is quite distinct from the ordinary civil suit before a jury. Unlike a judge in a civil suit, the Deputy Commissioner is not bound by common law or statutory rules of evidence or formal rules of procedure, 33 U.S.C., 923. In addition, certain presumptions, not elsewhere indulged, are recognized in a hearing brought in accordance with the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C., 920.

Finally, and most significantly, the burden of proof for the petitioner in a compensation hearing is less stringent than in a civil suit. Whereas, in a civil suit the petitioner must prove his case by a preponderance of the evidence,

in a hearing before the Commissioner all doubtful questions of fact are to be resolved in favor of the injured employee. See J. V. Vozzolo, Inc. v. Britton, D. C. Cir., 1967, 377 F.2d 144, 147; Friend v. Britton, D. C. Cir., 1955, 220 F.2d 820. The legislative history of the Administrative Procedure Act, 5 U.S.C., 500, et seq., cited by the appellant, is not deemed to be to the contrary.

The doctrine of collateral estoppel is inapplicable to the situation here presented. The judgment of the District Court is

AFFIRMED.

APPENDIX G

CHALLENGES
(28 U.S.C., 1870)

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court. June 25, 1948, c. 646, 62 Stat. 953; Sept. 16, 1959, Pub. L. 86-282, 73 Stat. 565.

APPENDIX H

CONSOLIDATION; SEPARATE TRIALS (Rule 42(b) FRCP)

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States. As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX I

PERMISSIVE JOINDER OF PARTIES
(Rule 20 FRCP)

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right of relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

APPENDIX J

THIRD-PARTY PRACTICE
(Rule 14(a) FRCP)

(a) When Defendant may Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is

the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested. As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966.

APPENDIX K

SPECIAL VERDICTS AND INTERROGATORIES (Rule 49(a) FRCP)

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment of the special verdict.

APPENDIX L

PROCEEDINGS
(February 22, 1967)

MR. ROBERTS: We have motions to be made out of the presence of the jury, Your Honor, in the Nehring case.

Your Honor, we move the Court number one, to either equalize the jury strikes that are afforded plaintiff and third party defendant so that the plaintiff would have an equal amount of strikes, the defendant and third party defendant, that they be limited to a total of three strikes and that tha third party action be severed, and in connection with this we say that we would be prejudiced if we are not given equal strikes.

THE COURT: Yes. I hear that motion every time you have a case in this court.

MR. ROBERTS: Yes, Your Honor, and I think it is a valid motion.

THE COURT: I have never thought that it was and I have never sustained it and I think the court should follow some consistency. I will be consistent and deny your motion.

I will instruct defendant and third party defendant that they will exercise their challenges independently. There will be no conferring or collusion between them, but if you strike the same ones, why that is the way it happens. The Defendant will have three challenges

and the third party defendant will have three challenges, and they will be exercised independently without knowledge of what the other party is doing.

MR. THOMPSON: If Your Honor please: I have understood clearly the Court's instruction and I want you to know as an officer of the Court that I have conferred not a bit with Mr. Goller or neither has anybody. I just wanted Mr. Roberts to know and I wanted to say it in open Court that there has been no predetermination that I am going to strike every fifth one or every sixth one. We haven't talked about it at all and don't intend to.

THE COURT: I don't know how you could predetermine that when the list hasn't been prepared yet.

APPENDIX M

Q Now, I showed you these to get you to comment about them along the line that you were talking about when I interrupted you. The general size of this man's problems began in 1960, didn't they?

A Concerning his back, in my opinion, yes, sir.

Q Now then, without going over these again, I will tell you that they show less time off work following this '64 injury than following the 1960 injury.

A Yes, sir.

Q Now, I recognize that the operations were identical, weren't they?

A No, not quite.

Q Well, removal of herniated disk material at the L-4, L-5 level, and a fusion in '61; a repair in '64.

A The first operation was at two levels and the second was only at one. It was a re-fusion.

Q The laminectomy phase of the operation in '64 was not as extensive as it was in '61 then?

A No, sir. Most of the disk was removed in '61. You don't ever get all of it out.

Q Besides, he had two levels before and only one level the second time?

A Yes, sir.

Q So you are only building the one-story house in '64 and building a two-story house in '60?

A If you want to put it that way, yes, sir.

Q That is something I can understand.

You spoke of a fracture of the bone that had been utilized for the fusion. Part of it was intact, L-4, L-5?

A That is one level that was intact, yes, sir.

Q And it was the lower level between L-5 and S-1. Now, are you talking about a psuedoarthrosis or a fracture?

A I don't know.

Q Well, I just didn't want the jury to get the idea that some bone had been busted back there.

A It may have or it may be that the fusion never matured at the 4,5 level. I don't know.

Q There is some legitimate question about it, even by yourself. You are not certain.

A That is correct.

APPENDIX N

VERDICTS OF THE JURY IN ANSWER TO INTERROGATORIES PROPOUNDED TO IT BY THE COURT UNDER THE PROVISIONS OF RULE 49(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Interrogatory No. 1:

Did the plaintiff, Lester Nehring, sustain an injury while working aboard the Rio Bermejo on or about January 9, 1964?

You will answer "Yes" or "No".

Answer: No

If you answer Interrogatory No. 1 in the negative, you need not answer any of the following interrogatories, but if you answer Interrogatory No. 1 in the affirmative, the following interrogatories will be answered.

APPENDIX O

ADDITIONAL REQUESTED INSTRUCTION

TO THE HONORABLE JUDGE OF SAID COURT:

You are instructed that if you find from a preponderance of the evidence that the condition of plaintiff's back before the occurrence in question did not cause him to experience disability, pain and/or suffering to the extent, if any, that you find from a preponderance of the evidence that he has experienced following the occurrence, if any, in question, and if you find from a preponderance of the evidence that the occurrence in question, if any, caused him to experience such greater disability, pain and/or suffering than he was experiencing immediately prior to the occurrence in question, if any, then the occurrence in question, if any, shall be considered by you as an injury and as the proximate cause of such additional disability, pain and/or suffering which you find from a preponderance of the evidence that he has and/or will in reasonable probability experience.

APPENDIX P

MR. ROBERTS: With reference to the instructions now, not the interrogatories. We except to the Court's not giving requested instructions 3, 4 and 5 and also we except to the failure to give the additional requested instructions dealing with definition of what would constitute an injury under the circumstances of the case.

We further renew our objection to the submission both of the primary and the indemnity actions together.

MR. THOMPSON: No objections, Your Honor, except those I assume are automatic based on my requested instructions or definitions which are not expressly included in the charge.

THE COURT: Everything not given is refused. I think it would be confusing to further instruct them.